DUNCAN MILLER (ON RECONSIDERATION)

IBLA 78-214 Decided February 23, 1979

Petition for reconsideration of an Order dismissing an appeal and remanding the case for further action. U-39431.

Petition granted; Order affirmed.

1. Oil and Gas: Stipulations

Upon a determination that a stipulation, which was not expressly made applicable to a parcel of land in the Notice of Availability, should be applied to an oil and gas lease, the State Office should inform the offeror of its intent to apply the stipulation. The application of such a stipulation is reviewable under 43 CFR 4.410.

2. Rules of Practice: Appeals: Standing to Appeal--Rules of Practice: Protests

The characterization of a submission as an "appeal" or as a "protest" is not binding upon a State Office; rather, reference must be made to the nature of the submission to determine whether the submission is properly treated as an "appeal" or as a "protest."

APPEARANCES: Duncan Miller, pro se; Acting State Director, Utah State Office.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Appellant, herein, filed an oil and gas lease offer for Parcel UT-4 in the December 1977 simultaneous filing procedure. His drawing entry card was drawn first, and, in accordance with 43 CFR 3112.4-1, he was notified by certified mail on January 18, 1978, that he was required to submit payment of the first year's rental ($1,992) within

15 days of his receipt of the notice. On January 30, 1978, he filed a notice of appeal, objecting, inter alia, that the Utah State Office, Bureau of Land Management (BLM), intended "to issue special stipulations pertaining to the captioned oil and gas lease. Yet, the appellant has no knowledge of what said stipulations are."

In its Order of August 14, 1978, the Board dismissed the appeal as premature. That Order stated:

> Initially we note that the Notice of Lands Available for Leasing adverted to the possibility that "any lease issued may contain such stipulations for environmental protection as may be subsequently determined to be necessary." While it is within the authority of BLM to reserve the right to impose additional stipulations as a condition precedent to the issuance of an oil and gas lease, we think it is obvious that such a stipulation must be presented to the prospective lessee for acceptance prior to the issuance of lease. Where such additional stipulations are not acceptable to the lessee, he has the right either to decline to accept the lease or to seek review of the inclusion of such specific stipulation on the grounds that it is arbitrary, capricious, or represents an abuse of discretion by BLM.
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> In the instant case, however, appellant has sought to appeal from a possible eventuality. There is no indication in the record that any such added stipulation will be applied to the subject lease. Given the posture of this case, the State Office should have treated appellant's submission as a protest to the possible inclusion of any additional stipulations and acted thereon. Such action could have entailed either a statement that no such stipulation would be applied to the subject lease, or it could have detailed the stipulation with justification for its application to the lease in issue. Given the present status of the case before us, however, we have no choice but to remand the case file to the State Office for further action as indicated above.

On September 19, 1978, the Acting Director, Utah State Office, requested that the Board reconsider its Order. Two separate matters were raised in this petition. First, the Acting State Director noted that the notice of lands had contained the following statement: "Special stipulations are listed below the individual parcels. The right to refuse to issue a lease is retained, and any lease issued may contain such stipulations for environmental protection as may be subsequently determined to be necessary." The Acting Director further noted that the notice expressly stated that the "filing of the offer to lease will be considered as acceptance of these terms and conditions by the offeror," and that directly under Parcel No. UT-4

(U-39431) was a notice that "a lease for the above parcel will be subject to special stipulations on USO Form 3100-8."

The second point raised was that the State Office "was not aware that we have the alternative to consider a document labeled 'appeal' as anything else." We will consider these two points seriatim.

[1] The first point pressed by the State Office is premised either on a misunderstanding of what this Board stated in its Order of August 14, 1978, or alternatively, on a misinterpretation of what the law is on acceptance of stipulations. The Board's Order was in no way premised on a belief that appellant could protest the application of the special stipulations found on USO Form 3100-8 to his lease offer. We agree that, to such an extent, appellant's offer effectively bound him to accept those stipulations. The point to which our Order was directed involved the possibility of inclusion of a stipulation not expressly applied in the notice, to which possibility the notice itself referred. It was our inability to determine whether, in point of fact, the State Office had "subsequently determined" that further stipulations would be applied to appellant's lease, which led to our ruling.

To the extent to which the State Office is contending that the inclusion of the expressed admonition that the lease would be subject to "such stipulations for environmental protection as may be subsequently determined to be necessary," effectively foreclosed any protest directed to additional stipulations, the State Office is simply in error. The animating rationale behind the rejection of protests relating to proposed stipulations which have been expressly delineated in the notice of availability is simply that they are untimely. When a BLM State Office announces its intent to offer specific parcels of land with various stipulations attached thereto, many individuals might well decide that they do not wish to participate in a specific lease drawing under the restrictions which such a stipulation might impose. If subsequently this Board were to determine that the stipulation ought not to be applied to a specific parcel, those who had failed to participate might well have a valid ground for objecting to the lease issuance, inasmuch as they refrained from tendering a DEC under the impression that the stipulation at issue would be applied to the land being leased. The proper method for seeking review of such a stipulation would be to protest the stipulation prior to the lease drawing.

When, however, the State Office decides after the drawing to include, in a lease, stipulations not specifically adverted to in the notice of availability, a different situation exists. The successful applicant has had no advance notice of the terms of the stipulation and can scarcely be said to have waived his objection to such a stipulation. This Board has held that a State Office has the authority to apply such a stipulation without any reference thereto in the notice

of availability, subject to the right of the lease applicant to seek review before the Board of the stipulation. We find it impossible to perceive how, through the simple device of informing prospective lessees that additional stipulations might be applied, the State Office's subsequent action becomes binding on a lessee and not subject to appeal or review. Indeed, it is only after a specific stipulation is proposed that any lessee can have notice sufficient to assent or object to its application. Our Order of August 14, 1978, was directed to this situation.

[2] The second point which the State Office raises relates to its authority to treat as a protest a submission denominated by an individual as an "appeal." We recognize the reluctance of the State Office to indulge in its own characterization of an individual's submission. Nevertheless, this Board has, on a number of occasions, informed a State Office that it erroneously treated an appellant's submission as an "appeal" where it was properly considered a "protest."

The Board's action in such cases has generally been premised on considerations of ripeness. Thus, in the appeal of Linda and Marvin Turley, IBLA 77-43, the Board in an Order dated March 25, 1977, held that a purported "appeal" of an advertisement of a timber sale was not justiciable. The Board therein noted:

> Irrespective of any other questions which this appeal raises, the appeal must be dismissed because there has been no appealable decision by BLM. Advertisement of a tract of timber for sale does not constitute a "decision" within the meaning of 43 CFR 4.410. Advertisement of the timber does not guarantee that a purchaser will come forward or that a contract will be entered into. However, the advertisement lends itself as the subject of a protest.

Cf. Duncan Miller, 24 IBLA 203, 204.

The rationale for the distinction between an "appeal" and a "protest" was examined, at some length, in California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). Crucial to that discussion was the fact that the general right of appeal, found in 43 CFR 4.410, is, by its terms, limited to those who are a "party to a case." Because of the importance of this question, we will cite the applicable language from that decision in extenso:

> As we understand the intermeshings of the various regulations, the purpose of the requirement that an individual be a "party to a case" before a notice of appeal to this Board wil lie is not to limit the rights of those who disagree with Bureau actions, but to afford a framework by which decisionmaking at the departmental and State Office level may be intelligently made.

> If an individual has been a "party to a case" and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual's input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited upon such an individual as a result of its actions. On the other hand, when an individual appears for the first time to object to proposed actions, treatment of this person's objections as an "appeal" effectively forecloses any consideration by the local authorized officer of the merits of the objection, since this Board has consistently held that upon the filing of a notice of appeal the State Office loses all jurisdiction over the matter being appealed. In this latter situation, the Board is, in effect, forced to make an initial decision, even though it is vested with appellate authority.
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> The above problem is vitiated if the objection of those who have not had prior input into a decision is treated as a protest under 43 CFR 4.450-2. The BLM State Office is provided with the opportunity to examine the merits of the submission and issue a decision thereon. Should the action taken by the State Office on the protest be perceived as adverse to the protestant's interests, he may then appeal that action to the Board under 43 CFR 4.410. See Crooks Creek Commune, 10 IBLA 243 (1973). 30 IBLA at 384-85.

It must, of course, be kept in mind that the filing of a protest generally suspends the authority of the State Office to act upon a matter until the protest has been ruled upon. California Association of Four Wheel Drive Clubs, supra. Further, action is additionally suspended after a ruling on a protest for the period of time in which a person adversely affected may file a notice of appeal therefrom. D. E. Pack, 31 IBLA 283 (1977). We emphasize these facts to make it clear that the treatment of an "appeal" as a protest does not adversely affect the appellant/protestant.

Admittedly, in the determination of whether an "appeal" should be treated as a protest, and conversely whether a "protest" should be treated as an appeal, care must be taken to apply standards in consonance with the purposes of the regulations as explicated in California Association of Four Wheel Drive Clubs, supra. It remains impossible, however, to definitively state a rule that will be applicable in all of the plethora of factual circumstances which may arise. Suffice it to state that there can be no substitute for common sense, and no regulation that can workably legislate it.

Turning to the facts of the instant appeal, it was our intent that the State Office determine what stipulations, in addition to USO

Form 3100.8, they intended to apply to the instant oil and gas lease, if any, and to so inform the appellant, who would then be able to make a decision on whether or not he objected to them. The State Office has provided us with no reason why we should alter our original Order.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, and the Order of August 14, 1978, is reaffirmed.

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James L. Burski
Administrative Judge

I concur:

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Newton Frishberg
Chief Administrative Judge

I concur in the result:

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Joseph W. Goss
Administrative Judge